(3)

Supreme Court, U.S.
FILED
JUL 7 - 2009
OFFICE OF THE CLERK

No. 08-1328

In the Supreme Court of the United States

DAVID GREENWELL,

Petitioner,

v.

PAUL PARSLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-3926

PHILIP C. KIMBALL
1970 Douglass Blvd.
Louisville, KY 40205
(502) 454-4479

ANDREW E. TAUBER
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3324

KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2187

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE CIRCUITS ARE DIVIDED 1

A. This Case Implicates A Public Employee's Right To Candidacy 1

B. The Circuits Are Split On A Public Employee's Right To Run For Office Against The Employee's Boss 3

II. *CARVER* WAS WRONGLY DECIDED 5

A. *Carver* Is Contrary To *Pickering* 5

B. *Carver* Rests On An Overly Restrictive Conception Of Politics 7

III. THE SIXTH CIRCUIT'S RULE CHILLS PROTECTED SPEECH 8

IV. CERTIORARI SHOULD BE GRANTED WHETHER OR NOT RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY 9

A. Respondent Is Not Entitled To Qualified Immunity 9

B. Certiorari Should Be Granted Even If Respondent Is Entitled To Qualified Immunity 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Branti v. *Finkel*,
445 U.S. 507 (1980) 7, 8

Carver v. *Dennis*,
104 F.3d 847 (6th Cir. 1997) ..... *passim*

Click v. *Copeland*,
970 F.2d 106 (5th Cir. 1992) 1, 3, 4, 7, 9

Connick v. *Myers*,
461 U.S. 138 (1983) 5

Elrod v. *Burns*,
427 U.S. 347 (1976) 7, 8

Finkelstein v. *Bergna*,
924 F.2d 1449 (9th Cir. 1991) 3

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) 3

Jantzen v. *Hawkins*,
188 F.3d 1247 (10th Cir. 1999) 3, 4, 5, 7

Murphy v. *Cockrell*,
505 F.3d 446 (6th Cir. 2007) 1

Myers v. *Dean*,
216 F. App'x 552 (6th Cir. 2007) 3

Newcomb v. *Brennan*,
558 F.2d 825 (7th Cir. 1977) 1, 3

Pearson v. *Callahan*,
129 S. Ct. 808 (2009) 9, 10, 11

Pickering v. *Bd. of Educ.*,
391 U.S. 563 (1968) ..... *passim*

Safford Unified Sch. Dist. v. *Redding*,
___ U.S. ___ (2009) 10

TABLE OF AUTHORITIES—continued

Page(s)

Sain v. *Mitchell*,
2009 WL 1457722 (W.D. Tenn. 2009) 2, 3

Saucier v. *Katz*,
533 U.S. 194 (2001) 10

Soldal v. *Cook County*,
506 U.S. 56 (1992) 10

Summe v. *Kenton County Clerk's Office*,
2009 WL 1684376 (E.D. Ky. 2009) 2, 3

MISCELLANEOUS

Paul Koster, *Handling Election Battle Fallout*
47 No. 8 DRI FOR THE DEFENSE 39 (2005) 1

REPLY BRIEF FOR PETITIONER

Respondent (i) denies the existence of a circuit split that the Sixth Circuit openly acknowledges (Opp. 16–21); (ii) assumes that *Carver* was correctly decided (Opp. 9–16); and (iii) claims entitlement to qualified immunity (Opp. 23–26).

In fact (i) there is an enduring circuit split that this case squarely implicates (see *infra* 1–5); (ii) *Carver* was wrongly decided in a way that conflicts with this Court's First Amendment jurisprudence (see *infra* 5–8); and (iii) respondent's alleged entitlement to qualified immunity is irrelevant to whether certiorari should be granted (see *infra* 9–11).

I. THE CIRCUITS ARE DIVIDED.

Respondent asserts that this case "does not implicate any circuit split." Opp. 8. But even the Sixth Circuit acknowledges that "[o]ther Circuits have not followed *Carver*." *Murphy*, 505 F.3d at 450 n.1. See also Pet. 20 n.9 (citing cases recognizing split); Paul Koster, *Handling Election Battle Fallout*, 47 No. 8 DRI FOR THE DEFENSE 39 (2005) ("courts throughout the country appear split" on whether a public employee's candidacy for political office implicates the First Amendment) (citing, *inter alia*, *Carver*, *Click*, and *Newcomb*). Respondent tries but fails to explain away this acknowledged split.

A. This Case Implicates A Public Employee's Right To Candidacy.

According to respondent, this case presents only "the very narrow issue of whether First Amendment protection * * * extends to the insubordination of a public employee stating his desire to take his boss'[s] job." Opp. 8. So seen, respondent asserts, this case

has nothing to do with a public employee's "right to run for political office" generally. Opp. 16. But the question presented in this case *does* implicate a public employee's right to candidacy in general and is *not* limited to situations in which the employee runs against his or her boss in particular.

In attempting to narrow the question presented, respondent ignores the basis for the decision below and the rule first articulated in *Carver*—namely, the Sixth Circuit's view that First Amendment protection does "not * * * extend[ ] to candidacy alone" and that "the simple announcement of a candidacy" does not constitute "protected political speech." Pet. App. 5a–7a. Although applied here and in *Carver* to instances in which public employees ran against their respective bosses, nothing in the Sixth Circuit's logic limits its application to such situations.

Indeed, two district courts recently interpreted *Carver* as applying to public employees' candidacies more generally. In *Sain* v. *Mitchell*, 2009 WL 1457722 (W.D. Tenn. 2009), the plaintiff was a state trooper who lost his job after running not against his boss (who held an appointed, state-level position), but for mayor. The court granted the defendants summary judgment based, in part, on *Carver*. See *id.* at *5 & n.6 ("it is not apparent whether the holding of *Carver* applies to all candidacies or just challenges against supervisors," but "[t]he fact that the Sixth Circuit emphasized the word 'candidacy' supports the notion that it intended the holding to apply to all types of candidacies"). As the court observed in *Summe* v. *Kenton County Clerk's Office*, 2009 WL 1684376, at *5 n.5 (E.D. Ky. 2009), "[a]lthough *Carver*, *Greenwell*, and *Myers* all involved the employee running against his/her current boss for

his/her boss's job, the same theory would apply to a non-incumbent."

As the *Sain* and *Summe* courts recognized, whether a public employee has a First Amendment interest in running for elected office does not depend on the identity of the employee's opponent.[1] There is therefore no merit to respondent's suggestion that *Carver* and the decision below are not in conflict with the Ninth Circuit's decision in *Finkelstein* and the Seventh Circuit's decision in *Newcomb*. Cf. Opp. 19–20 (attempting to distinguish *Finkelstein* and *Newcomb* on the ground that they involved candidacies against individuals other than the employees' respective bosses).

B. The Circuits Are Split On A Public Employee's Right To Run For Office Against The Employee's Boss.

Even if the issue presented by this case were as narrow as respondent claims, there still is a clear, persistent, and openly acknowledged circuit split in need of resolution. Both *Click* and *Jantzen* involved public employees who ran for office against their re-

---

[1] That an employee has chosen to run against his or her boss might be relevant at the second stage of the *Pickering* analysis, which asks whether, given the employee's First Amendment interest in speaking on matters of public concern, "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. But the fact that the employee has chosen to run against his or her boss rather than against someone else is *not* relevant to the threshold question of "whether the employee spoke as a citizen on a matter of public concern." *Ibid.* If that question is answered in the affirmative, then First Amendment protections attach, regardless of whom the employee is running against. See Pet. 12–15 & n.6; see also *infra* at 5–7.

spective bosses. And, as explained in the petition (see Pet. 20–21), the holding in each squarely conflicts with *Carver* and the decision below.

According to respondent, *Click* is "clearly distinguishable" because "insubordination was [n]ever made an issue in that case." Opp. 17 & n.4. But that characterization of *Click* is inconsistent with respondent's theory in this case and with the Sixth Circuit's holding in *Carver*, according to which a public employee's declaration of candidacy against his or her boss is a *per se* act of insubordination (and thus, purportedly, unprotected by the First Amendment). Cf. *Carver*, 104 F.3d at 853 ("Carver's declaration of candidacy * * * was insubordination."); Pet. App. 14a ("As the court held in *Carver*, seeking election against a person's boss for his job is an act of insubordination not protected by the First Amendment."); Opp. 13 (describing petitioner's candidacy as "an insubordinate decision of an employee to take his boss'[s] job."). If, however, a public employee's candidacy against his or her boss is *per se* insubordination, then—contrary to respondent's characterization—*Click*, which indisputably involved employees who ran against their boss, necessarily involved "insubordination" too and thus cannot be distinguished on that basis.

Respondent's attempt to distinguish *Jantzen* also fails. According to respondent, *Jantzen* stands for the proposition that "[a]n insubordinate employee seeking to oust his own boss is not protected under the First Amendment." Opp. 19. But that is not accurate. As explained in the petition (see Pet. 21–24), *Jantzen* differentiated the employee's speech rights and associational rights. Although *Jantzen*, citing *Carver*, held that the employee's *associational* rights were not implicated by his firing (see 188 F.3d at

1252), it also held that the employee's *speech* rights were implicated because "candidacy for office" constituted "political speech" that "undoubtedly relates to matters of public concern" and therefore "satisfies the first prong of the *Pickering/Connick* test" (*id.* at 1257).[2] That holding squarely conflicts with *Carver*, which expressly held that "*Pickering* * * * do[es] not apply" when a public employee announces his or her candidacy for the office held by his or her boss. 104 F.3d at 852.

II. *CARVER* WAS WRONGLY DECIDED.

According to respondent, "[t]he First Amendment has not been implicated in this case" because "[d]ismissal of an employee for insubordination is both proper and reasonable as a matter of law under *Carver*." Opp. 8, 13. But respondent assumes precisely that which must be proven. The very question in this case is whether *Carver* was correctly decided. It was not.

A. *Carver* Is Contrary To *Pickering*.

Carver holds that a public employee's candidacy against his or her boss is "insubordination" and for that reason entitled to no First Amendment protection. 104 F.3d at 853. That, however, is contrary to this Court's First Amendment jurisprudence.

---

[2] Having found that the employee's candidacy constituted political speech on a matter of public concern, and was therefore entitled to First Amendment protection, the court proceeded to the second stage of the *Pickering* analysis, at which point it concluded, under the specific circumstances of the case, that the employee's speech interest did not outweigh the employer's interest in the efficient provision of government services. See *Jantzen*, 188 F.3d at 1258.

Because public employers rarely discipline employees who praise the employer, public employee speech cases tend by their very nature to be "insubordination" cases. Indeed, *Pickering* itself involved an employee who had verbally "attack[ed]" his employer using assertions that this Court agreed were "false." *Pickering*, 391 U.S. at 566, 570. Although the employee "made erroneous public statements * * * critical of his ultimate employer," this Court determined that his conduct enjoyed First Amendment protection because "it is essential that [public employees] be able to speak out freely on [matters of public concern] without fear of retaliatory dismissal." *Id.* at 572. Thus, contrary to *Carver*, "insubordinate" conduct is not automatically beyond the First Amendment's reach.

Having erroneously classified "insubordination" as categorically beyond First Amendment protection, the Sixth Circuit—in this case as in *Carver*—failed to apply the two-step analytic framework mandated by *Pickering*. See Pet. 13–16. Rather than "balanc[ing]" the employee's interest in speaking on matters of public concern and the employer's interest in the efficient delivery of public services (391 U.S. at 568), the Sixth Circuit simply denied the existence of the employee's First Amendment interest altogether. That cannot be reconciled either with this Court's repeated recognition that electoral speech lies at the core of First Amendment protections (see Pet. 9–11, 14 (collecting cases)) or with this Court's insistence that statements on matters of public concern by public employees "be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Pickering*, 391 U.S. at 574.

A public employee's interest in speaking on a matter of public concern might sometimes be outweighed by the employer's interest in the efficient provision of public services. Compare, *e.g.*, *Click*, 970 F.2d at 112 ("On these facts the balancing clearly tips in favor of the [employees]."), with *Jantzen*, 188 F.3d at 1258 ("Under these circumstances, [the employee's] interest in his speech does not outweigh the defendants' interest in efficient law enforcement."). But as *Click* and *Jantzen* (both of which involved deputy sheriffs running against the incumbent sheriff) demonstrate, that determination must be made on a case-by-case rather than categorical basis.

B. *Carver* Rests On An Overly Restrictive Conception Of Politics.

Carver held that the dismissal of a public employee "discharged solely because she announced her candidacy" against her boss "implicate[d] none of the concerns raised by *Elrod* or *Branti*" because it "was not a dismissal because of political beliefs or affiliations" and indeed "was not a dismissal based on politics at all, except to the extent that running for public office is a political exercise in its broad sense." 104 F.3d at 850.

Carver's holding rests on an unduly restrictive conception of politics, political belief, and political affiliation. Running for public office is a political exercise not merely in the "broad sense" of the term but in every sense. Moreover, a candidacy announcement is necessarily a declaration of political belief—the candidate's belief that he or she, rather than the opposing candidate, should be elected, and that the candidate's policies, rather than those advocated by the opponent, should be implemented. Furthermore, a candidacy announcement necessarily implicates

the candidate's associational rights because an electoral campaign is by its very nature meant to attract like-minded people—to volunteer, to donate, and ultimately to vote. Accordingly, when a public employee is dismissed for announcing a candidacy for elected office, that dismissal does, contrary to *Carver*, implicate the concerns raised by *Elrod* and *Branti*.

III. THE SIXTH CIRCUIT'S RULE CHILLS PROTECTED SPEECH.

Respondent dismisses as mere "speculation" petitioner's observation that *Carver* chills the political speech of public employees. Opp. 22; cf. Pet. 25–28. But this Court correctly recognizes that "the threat of dismissal from public employment is * * * a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574.

Respondent points to petitioner's own candidacy as evidence that there is no chilling effect. But petitioner, who was fired as a result, paid a steep price for his candidacy—a price that under the First Amendment he should not have had to pay.

In any event, the question is not whether petitioner was deterred from running but whether *others*, knowing what happened to petitioner, will be deterred in the future. First Amendment cases alleging actual (as opposed to imminent) injury are, by definition, brought by individuals who were not themselves deterred from exercising their rights. But the right to free speech is not reserved for only those who are the most resistant to intimidation. Accordingly, when considering the consequences of the Sixth Circuit's rule, this Court must consider the rule's likely chilling effect on future potential candidates.

IV. CERTIORARI SHOULD BE GRANTED WHETHER OR NOT RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY.

Respondent's claimed entitlement to qualified immunity is no impediment to granting certiorari.

A. Respondent Is Not Entitled To Qualified Immunity.

Respondent claims that he is "entitled to qualified immunity as a matter of law." Opp. 23. He is not. The Court's decisions leave—and as of petitioner's termination in 2005 left—no doubt that citizens, including public employees, have a First Amendment interest in running for elected office, speaking on matters of public concern, and participating in the political process. See Pet. 8–20. In light of that precedent, qualified immunity is unavailable because "a reasonable person would have known" (*Pearson* v. *Callahan*, 129 S. Ct. 808, 815 (2009) (internal quotation marks omitted)) that firing petitioner because of his candidacy violated petitioner's rights under the First Amendment. Indeed, the Fifth Circuit has found—in the specific context of deputies running against an incumbent sheriff—that a public employee's right to run for the office held by his or her boss was already "clearly established" by 1988. *Click*, 970 F.2d at 109–113.[3]

---

[3] Because its adjudication might depend on facts that are not in the record (*e.g.*, the precise duties of Bullitt County deputy sheriffs and the county's past experience with deputies running for elected office), the question of qualified immunity might be best left to the lower courts on remand.

B. Certiorari Should Be Granted Even If Respondent Is Entitled To Qualified Immunity.

Even if respondent were entitled to qualified immunity, certiorari should be granted.

Whether an official is entitled to qualified immunity depends on a two-part inquiry: (i) whether a constitutional right was violated on the facts alleged or established; and, assuming such a violation occurred, (ii) whether the constitutional right was clearly established at the time of its violation. See *Pearson*, 129 S. Ct. at 815–816.

Until recently, the lower courts were required to reach the constitutional issue first, and only then decide whether the asserted right was clearly established at the relevant time. See *id.* at 818, overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001). Addressing the constitutional issue first was believed "necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation." *Id.* at 816 (quoting *Saucier*, 533 U.S. at 201). And although addressing the constitutional issue first is no longer mandatory, this Court continues to recognize that doing so "is often appropriate" because it "promotes the development of constitutional precedent." *Id.* at 818.[4]

---

[4] This Court routinely grants certiorari to review, and then reaches, the constitutional question although the defendant might be entitled to qualified immunity because of a division among the lower courts. See, *e.g.*, *Safford Unified Sch. Dist.* v. *Redding*, ___ U.S. ___ (2009) (deciding constitutional question despite finding qualified immunity); *Soldal* v. *Cook County*, 506 U.S. 56 (1992) (granting certiorari and reversing despite lower court finding that no constitutional violation had occurred).

None of the reasons identified in *Pearson* for why a lower court might choose to avoid the constitutional question applies here. First, given this Court's position atop the judicial hierarchy, neither this case nor any other before this Court is a case in which "the question will soon be decided by a higher court." *Id.* at 819. Second, given the clarity of this Court's First Amendment jurisprudence, this is not a case in which it is "far from obvious whether in fact there is" the constitutional right invoked by petitioner. *Id.* at 818. Finally, because the question presented is unlikely to "arise in cases in which [the qualified immunity] defense is not available" (*id.* at 822), answering that question in this case is "especially valuable" for "the development of constitutional precedent" (*id.* at 818).

If the existence of a circuit split on the constitutional issue automatically entitled the defendant to qualified immunity, and if the defendant's entitlement to qualified immunity automatically precluded certiorari, then plaintiffs who lost below could never obtain review in this Court on constitutional issues as to which the circuits are split. Only defendants who lost below would have access to this Court.

But that cannot be so. Such asymmetric access would not only be unfair, but would likely leave many circuit splits unresolved. In circuits where the relevant constitutional right has been recognized, cases presenting the constitutional issue will no longer arise because potential defendants will avoid the forbidden conduct. In circuits where the right has not been recognized, defendants who engage in such conduct will win any ensuing suit, and would

---

Qualified immunity protects officials when the law is unclear; certiorari review clarifies the law.

then avoid review in this Court on qualified immunity grounds. Consequently, if a circuit split on the constitutional issue automatically entitles the defendant to qualified immunity, and if the defendant's entitlement to qualified immunity automatically precludes certiorari, then the very cases that most require this Court's intervention—namely, cases involving constitutional issues on which the circuits are divided—would be effectively immune from such review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

EUGENE VOLOKH
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-3926

PHILIP C. KIMBALL
1970 Douglass Blvd.
Louisville, KY 40205
(502) 454-4479

ANDREW E. TAUBER
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3324

KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2187

Counsel for Petitioner

JULY 2009